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February 17, 2000

Ms. Magalie Salas
Secretary, Federal Communications Commission
445 12th Street, S. W.
Washington, D. C. 20554

RE: In the Matter of American Communications Service, Inc. and MCI Telecommunications Corp. Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended CC Docket No. 97-100,

Dear Ms. Salas:

Enclosed for filing, please find an original and nine (9) copies of the Comments of the Arkansas Telecommunications Association regarding the above-captioned matter. Also, I have enclosed a computer disk with the Comments in *WORD* format as requested.

Kindly file and return the extra file-marked copies to me in the enclosed self-addressed stamped envelope. If you should have any questions, please contact me. Thank you.

With kindest regards.

Sincerely,

George Hopkins

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Attorney at Law

GH:tlp
Enclosure

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Ms. Sheryl Todd, w/encl.
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American Communications Services, Inc w/encl.
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Mr. Martin E. Grambow w/encl.
Mr. Michael Kellogg, et al w/encl.
MCI Telecommunications w/encl.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
American Communications Services, Inc.	)	
MCI Telecommunications Corp.	)	CC Docket No.97-100
	)	
Petitions for Expedited Declaratory Ruling	)	
Preempting Arkansas Telecommunications	)	
Regulatory Reform Act of 1997 Pursuant to	)	
Sections 251, 252, and 253 of the	)	
Communications Act of 1934, as amended	)	

COMMENTS OF THE ARKANSAS TELECOMMUNICATIONS ASSOCIATION

Background

The Arkansas Telecommunication Association[1] (hereinafter "ATA"), submits these Comments in response to the Public Notice [2] (The Commission Seeks Comment Regarding Whether Universal Service Provisions of Arkansas Act Comport With Federal Law), CC Docket No. 97-100, DA 00-50 released January 14, 2000 (hereinafter "Public Notice"). The purpose of the Public Notice is to create a fresh and current record for the Commission to make a decision whether the provisions of Sections 4 and 5 of the Arkansas Telecommunications Regulatory Reform Act of 1997 (hereinafter "Arkansas Act") are in conflict with Federal law and the Commission's implementing regulations. The Public Notice was issued after the Commission released an order [3] (hereinafter "Arkansas Preemption Order") on the petitions filed by American

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[1] The ATA is an association with membership that includes all the ILECs in Arkansas. The ATA does not, however, represent Southwestern Bell Telephone Company in this Docket because Southwestern Bell has filed its own comments under separate cover.

[2] Public Notice, Federal Communications Commission, CC Docket No. 97-100, released January 14, 2000.

[3] Arkansas Preemption Order, Federal Communications Commission, CC Docket No. 97-100 released December 23, 1999.

Communication Services, Inc. (hereinafter "ACSI") and MCI Telecommunications Co., Inc. (hereinafter "MCI") on December 23, 1999. The Commission decided to defer action on issues related to Sections 4 and 5 until the parties could respond to certain significant developments in federal universal service law and policy. The ATA will state its initial position and respond to any specific challenges to Sections 4 and 5 by reply comments.

The Arkansas Act

In 1996, Congress passed the Telecommunications Act of 1996 (hereinafter "Federal Act"). In response to the issues created by the Federal Act, the Arkansas General Assembly adopted the Arkansas Act in 1997. The Arkansas Act was overwhelmingly supported in the Arkansas General Assembly by both Democrats and Republicans. The Act was overwhelmingly supported by both urban and rural legislators. The Commission has recognized that states maintain the primary responsibility for ensuring reasonable comparability of rates within their boundaries.[4]

The constant themes of the Arkansas Act are to ensure rural Arkansans continue to receive quality service at reasonable prices with comparable services and rates between urban and rural areas while complying with the Federal Act and implementing regulations. The Governor of Arkansas signed the bill into law as the Arkansas Act in early 1997. Arkansas state government, through the Attorney General's office, has continued to vigorously support the Arkansas Act before the Commission.[5] The Arkansas Act stands as important legislation

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[4] See Ninth Report & Order and Eighteenth Order on Reconsideration (Federal-State Joint Board on Universal Service) (hereinafter Non-rural Order), CC Docket No. 96-45, FCC 99-306, released November 2, 1999, para. 46.

[5] See Arkansas Attorney General's filings in CC Docket 97-100.

specifically tailored by Arkansans to protect and promote Arkansas policy on services and rates for Arkansas customers.

Framework for Preemption

In the Arkansas Preemption Order, the Commission noted that preemption under Section 253 of the Federal Act was targeted to actions that had the effect of prohibiting entities from providing telecommunications services.[6] The Commission also held that it has general preemption authority under the Supremacy Clause.[7] Under the Supremacy Clause, the Commission found it has conflict preemption authority to remove a conflict between federal and state law. The Commission preempted various sections of the Arkansas Act using conflict preemption authority.[8]

Distinct Federal and State Roles

Congress made it clear that the states have a large and important role in providing universal service. The Commission has also recognized that authority.[9] The Commission has recognized states have extensive authority over intrastate universal service issues.[10]

The Federal Act and the Commission have left significant intrastate universal service funding and distribution decisions to the states. Universal service has not been federalized or commandeered by Congress nor the Commission. For instance, state funding of universal

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[6] See Arkansas Preemption Order, para. 14.

[7] See Id. para. 13.

[8] See Id. para. 44.

[9] See Non-rural Order, para. 46.

[10] See Id. paras. 36, 46, 57, & 67.

service may be implicit or explicit.[11] Section 254 (f) of the Federal Act expressly permits Arkansas to "adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service" and to adopt programs which do "not rely on or burden Federal universal service support mechanisms." Inconsistent is defined as "mutually repugnant or contradictory; contrary, one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other."[12] Importantly, the Federal Act uses the term "not inconsistent". Congress could have used the term "consistent" in its place. The Federal Act uses "not inconsistent" to show that states were given great latitude to craft individualized state programs that are distinct and separate from federal programs.

The terms "rely on or burden the Federal universal support mechanism" have specific meaning. The ATA submits a state program, whether explicit or implicit, does not rely on or burden the federal mechanism unless the state mechanism attempts to shift funding obligations from the state to the federal mechanism.[13] A state could rely on or burden the Federal universal service mechanism by directing the Federal universal service mechanism be used for state purposes or by intentional shifting of funding responsibility from state to federal funding by unfair manipulation.

The AUSF in no way relies upon the federal mechanism to provide supplemental federal funding for state programs. The AUSF does not attempt to shift funding requirements (burden)

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[11] See Id. para. 46.

[12] Black's Law Dictionary. (rev. 5th ed. 1979).

[13] See Non-rural Order, para. 96.

from the state to the federal level. The AUSF provides an explicit support mechanism as contemplated and viewed favorably by the 9th Report and Order. [14]

The 10th Amendment to the United States Constitution prohibits Congress from adopting legislation requiring the states to adopt and enforce specific legislation.[15] The Commission seems to have recognized this in its discussion about universal service in the Non-rural Order. [16]

General Response To Petitions

The ATA will restate to preserve for the record some of the previous arguments it made in support of the Arkansas Act. Most of the specifics of the ATA will be in reply comments to any surviving arguments made against Sections 4 and 5 in the comments being filed. Some previous arguments are already stated in these Comments and will not be restated here.

Section 4 Issues

The policy considerations supported by the AUSF are consistent with federal law. The funding is equitable and nondiscriminatory and paid by all responsible intrastate telecommunications providers.[17] The Federal Act does not impose specific cost methodologies on state universal service funds or even mandate a state have a fund. The AUSF does not directly or indirectly prohibit any entity from providing a telecommunications service.

The petitioners state that the Arkansas Act impermissibly attempts to preserve revenue streams for ILECs in violation of the 1996 Act.[18] MCI states the Arkansas Act guarantees ILECs

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[14] See Id. para. 57.

[15] See New York vs. United States, 505 U.S. 144 (1992).

[16] See Non-rural Order, para. 67.

[17] See Arkansas Act § 4(b).

[18] See MCI Petition p. 13.

the same level of federal universal service funding which they received prior to the passage of the 1996 Act. The revenue may not always come from AUSF support.[19] The Arkansas PSC may change the AUSF Rules, if changes are warranted. The lost revenue may come from an increase in the rates for basic local exchange service.[20] MCI appears to assume any funding will automatically come from the AUSF. However, the Arkansas law does not require such an outcome. Even if the funding comes from the AUSF, Section 254 (f) of the Federal Act allows separate state support mechanisms. The Commission has also recognized the benefit and need for "hold-harmless" provisions. [21]

The petitioners argue that no provision is made in the AUSF for the competitors of ILECs to receive additional funding. CLECs may receive indirect benefits by how the Arkansas PSC establishes wholesale rates after taking in consideration AUSF support. Further, § 4 (e)(5) of the Arkansas Act provides that all eligible telecommunications carriers may request high cost funding from the AUSF as necessary to maintain rates for universal service that are reasonable, affordable, and comparable between urban and rural areas. [22] Any ETC may obtain high cost funding through the AUSF Rules.[23]

A CLEC may be an ETC under the Arkansas Act. The petitioners also argue the Arkansas Act requires a public interest determination for ETCs in non-rural areas in conflict with the Federal Act. To the ATA's knowledge, the Arkansas PSC has not adopted rules related to

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[19] See Arkansas Act §§4 (e)(4)(A), 4(e)3 (revenue may come from an increase in rates rather than from the AUSF).

[20] See Id.

[21] See Non-rural Order, para. 78.

[22] See Arkansas Act §4 (e)(5).

[23] See AUSF Rule 2.01 D.

such a public interest determination. The review may only require that the entity prove it is a CLEC in good standing. The state PSCs are not forbidden from requiring separate public interest determinations in non-rural areas. The Federal Act in §214 (e)(2) provides:

> Upon request and consistent with the public interest, convenience, and necessity, the State Commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas . . . [24]

The language establishes the state PSCs must have a request and act consistent with the public interest, convenience, and necessity. The underlined language above applies to the entire sentence not just to rural areas. A state PSC would not designate a CLEC as an ETC without a request from the carrier in any area, whether rural or non-rural. Further Arkansas does not determine the type or amount of FUSF funding available to an ETC.

The petitioners argue that the Arkansas Act precludes any rate case or earnings investigation for AUSF support.[25] However, the ATA understands these words to mean that a traditional rate case or earnings investigation is not justified for universal service funding. A separate type of financial review is not precluded. Such a distinction is not inconsistent with the Federal Act. The AUSF cannot be required to use the forward looking economic cost proxies. A state policy may focus on separate policies or goals from the Commission. Stranded costs are an important policy for states to monitor and address. States must address the potential liability that can arise from legal concerns such as "takings" and "promissory estoppel".

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[24] See Federal Act § 214(e)(2).

[25] See MCI Petition, p. 14.

Section 5

The petitioners object to the ILECs being designated ETCs by the Arkansas Act. However, the ILECs currently are carriers of last resort in Arkansas. The Arkansas PSC reviewed the ETC statements of ILECs in a specific docket.[26] All that was required was done.

The petitioners object to the provision in the AUSF that an ILEC's funding shall not be less than a CLEC's funding from the AUSF.[27] However, Arkansas has the right to structure its own fund. A CLEC should look at universal service funding available to an ILEC to determine whether it is economically reasonable to build additional facilities (forward looking concept). If a CLEC's new facilities mean a greater drain on the AUSF than the ILECs facilities, then it is not economically wise for Arkansas to support a more expensive duplicative plan.

The petitioners object to Arkansas designating a rural ILEC as the only ETC in areas served by that rural ILEC.[28] Such a designation is consistent with the Federal Act. Section 214 (e)(2) provides the states with the responsibility of designating ETCs for the purpose of distributing federal universal service support. Section 214 (e)(2) provides that the state commission **may**, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an [ETC] for a service area designated by the state commission (emphasis added).[29]

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[26] APSC Docket No. 97-326-U

[27] MCI Petition, p. 17.

[28] MCI Petition pp. 17-18.

[29] Federal Act §214 (e)(2).

Section 214 (e)(2) is consistent with the designation of a single ETC in a rural telephone company area. Although, Arkansas may have designated more than one ETC in a rural area, the Federal Act does not require Arkansas to allow additional ETCs in rural areas.

The Arkansas Act establishes certain conditions for eligibility to receive AUSF as an ETC.[30] To be an ETC, the carrier has the responsibility to provide service to all customers in a local exchange area using its own facilities at least in part.[31] The provision does not require any specific facilities. Once any facilities exist, then the provider may, by resale or otherwise, obtain necessary network elements to offer service to all customers in the exchange area. A CLEC may meet these requirements and obtain AUSF support.

The ILECs are still required to be the carrier of last resort and to provide telecommunications services to applicants within its exchange area, even if such applicants are not economically desirable or valuable as customers. As admitted, it may be difficult to service some residential customers economically. [32] The ILEC, initially, has no choice except to serve these expensive customers. The duty to serve all customers as an ETC is reasonable.

The petitioners claim an ETC should be eligible for universal service support for elements of the local network it does not own or maintain.[33] For what do ETCs need such support? Intrastate universal service support may be targeted to assist with the cost of

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[30] See Arkansas Act § 5.

[31] Id.

[32] See ACSI Petition, p.17.

[33] See ACSI Petition, p. 18.

establishing and maintaining facilities in high cost areas to keep intrastate rates and services comparable.[34] The Arkansas Act provides such support.

The petitioners acknowledge that CLECs will have the FUSF as a source of support in Arkansas.[35] The petitioners admit the Arkansas Act does not block CLECs from obtaining FUSF support. The petitioners argue an ILEC has a de jure advantage by the AUSF support.[36] However, an ILEC also must support the cost of high cost facilities that a CLEC is not required to support. The petitioners have not demonstrated the amount of the support an ILEC would receive from the AUSF outweighs the cost of owning and maintaining the high cost facilities.

CONCLUSION

The Arkansas Act is a reasonable state response to the specific issues in Arkansas. The Commission should refrain from preempting any part of Sections 4 and 5 of the Arkansas Act.

Respectfully submitted,

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[34] See Non-rural Order, para. 46.

[35] See ACSI Petition, p. 19.

[36] Id.

CERTIFICATE OF SERVICE

I, George Hopkins, hereby certify that a true and correct copy of the above and foregoing Comments was served, by Federal Express, on this 17th day of February, 2000, to the following:

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